

Calendar No. 1932

82D CONGRESS }
2d Session }

SENATE

} REPORT
No. 2008

MR. AND MRS. THOMAS H. CAMPBELL

JULY 1 (legislative day, JUNE 27), 1952.—Ordered to be printed

Mr. McCARRAN, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H. R. 2073]

The Committee on the Judiciary, to which was referred the bill (H. R. 2073) for the relief of Mr. and Mrs. Thomas H. Campbell, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to pay the sum of \$5,000 to Mr. and Mrs. Thomas H. Campbell, of Heflin, Ala., in full settlement of all claims against the United States arising out of the death of their minor son, James R. Campbell, which occurred at Esslingen, Germany, on November 21, 1949, as the result of an accident involving a United States Army vehicle.

STATEMENT

On November 21, 1949, at about 4:30 p. m., a United States Army bus, operated by Alfred Schumann, a German citizen and an employee of the Army, was proceeding in a southeasterly direction along a street by the name of Hasenrainweg, in Oberesslingen, Germany, carrying children of American personnel from school to their homes. The bus stopped near the curb at the northwest corner of the intersection of Hasenrainweg and a side street to discharge Thomas Campbell, the eldest son of Maj. and Mrs. Thomas H. Campbell, United States Army. Major Campbell, his wife (Mrs. Mary P. Campbell) and their three children, Thomas Campbell, 7 years of age, a daughter, 4 years of age, and James Russell Campbell, 20 months of age, were quartered in a house located at 74 Hasenrainweg, which was directly across the street from the point where the bus stopped. While the bus was

standing across the street from the Campbell residence, James Russell Campbell and his 4-year-old sister left the Campbell yard through an unfastened gate and crossed the street to meet their brother, Thomas, who was getting off the bus. After Thomas Campbell had left the bus and another child had boarded it, the driver shut the door of the bus, and, after looking around, slowly started the vehicle. It appears that James Russell Campbell had stopped immediately in front of the right front wheel of the bus while his sister was walking away and returning to the Campbell home. As the bus started he was struck either by the front bumper thereof or by the right front wheel and knocked to the pavement. Either the impact of the bumper or the wheel running over his head inflicted severe head injuries from which he died immediately.

The Secretary of the Army, in his report dated November 6, 1950, states the details and circumstances of this accident, insofar as that is possible upon the basis of the Army's investigation report, and the statements of Mrs. Campbell, Mr. Alfred Schumann, the driver of the vehicle, and several eyewitnesses. This report of the Secretary of the Army makes certain findings relieving the driver of negligence in this case, and concludes that there is no basis for granting an award to Major and Mrs. Campbell for the death of their son.

In addition to relating certain findings of fact, the departmental report cites several cases supporting the general proposition that the driver of a vehicle who has no reason to anticipate the presence of children near his vehicle is not deemed negligent for starting his vehicle and striking a child who was in fact nearby but out of the driver's range of vision. This line of authority is cited, however, upon the premise that the driver involved herein did not observe the deceased child or his sister in the vicinity of his vehicle before or at the time he set the vehicle in motion.

It is fundamental law that the operator of a motor vehicle must exercise care toward a person who may be near or in the path of his vehicle, the degree of care required varying according to the age of such person and to the place, circumstances, conditions, and surroundings in which such person is situated. With particular reference to the duty of care owed to children, the following statement appears in 5 American Jurisprudence, Automobiles, section 185:

The driver of an automobile is not an insurer against injuries to children from the operation of the car. He is bound to exercise ordinary reasonable or due care toward children as well as toward adults. The age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised such care. Actually, in certain instances the driver may be required to exercise greater care toward children than toward adults, but this greater care is on one sense but "ordinary" care namely that degree of care which a man of ordinary prudence would exercise under the circumstances. *He must exercise greater caution in order to avoid danger to children whom he may see, or, by the exercise of reasonable care should see on or near the highway.* Emphasis supplied.

In reaching the conclusion that the driver involved herein was free from negligence, the Department of the Army begins with the basic premise that the driver did not see James Russell Campbell or his sister walk in front of or near his bus. Mr. Schumann, the driver, stated in an affidavit concerning this accident that "neither children nor any grown-ups were in the vicinity," except for Tommy Campbell, who had left the bus at this particular stop. However, the statement

of Mrs. Campbell places in direct issue the question as to whether the driver should have seen the 20-month old child who was hit or his 4-year-old sister in the vicinity of the bus before he set it in motion. In these circumstances the possibility is apparent that interrogation of the parties and the eyewitnesses in a judicial proceeding may have developed a finding of negligence.

The committee is cognizant of the fact that the Army's investigating officer has assigned responsibility for this accident to "whomever was caring for the child at the time of the accident." That is a summary conclusion, however, with which the committee does not concur, on the basis of the evidence, for it does not appear that such conclusion followed consideration of the possibility that the driver might reasonably have been put on notice as to the presence of small children. If it were practicable, under the circumstances, to refer this matter to a court the committee would be inclined to do so. However, the claimants have no remedy under the Federal Tort Claims Act for the reason that the accident resulting in the death of their son occurred in a foreign country, and the parties and witnesses involved are so situated so to make it impracticable to test the question of negligence in a United States court.

Upon review of all the circumstances, the committee is of the opinion that Mr. and Mrs. Campbell should be compensated for the death of their son, and recommends favorable consideration of this legislation.

The report of the Department of the Army concerning this matter is appended hereto, and made a part of this report.

DEPARTMENT OF THE ARMY,
Washington 25, D. C., November 6, 1950.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives.*

DEAR MR. CELLER: Reference is made to your letter with which you enclosed a copy of H. R. 8402, Eighty-first Congress, a bill for the relief of Maj. Thomas H. Campbell, and requesting a report on the merits of the bill.

This bill provides as follows: "That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Major Thomas H. Campbell, Heflin, Alabama, the sum of \$10,000. The payment of such sum shall be in full settlement of all claims of the said Major Thomas H. Campbell against the United States arising out of the death of his minor son, James R. Campbell, which occurred at Esslingen, Germany, on November 21, 1949, as the result of an accident involving a United States Army vehicle."

On November 21, 1949, at about 4:30 p. m., a United States Army bus, operated by Alfred Schumann, a German citizen and an employee of the Army, was proceeding in a southeasterly direction along a street by the name of Hasenrainweg, in Oberesslingen, Germany, carrying children of American personnel from school to their homes. The bus stopped near the curb at the northwest corner of the intersection of Hasenrainweg and a side street to discharge Thomas Campbell, the eldest son of Maj. Thomas H. Campbell, United States Army. Major Campbell, his wife (Mrs. Mary P. Campbell), and their three children, Thomas Campbell, 7 years of age, a daughter, 4 years of age, and James Russell Campbell, 20 months of age, were quartered in a house located at 74 Hasenrainweg, which was directly across the street from the point where the bus stopped. While the bus was standing across the street from the Campbell residence, James Russell Campbell and his 4-year-old sister left the Campbell yard through an unfastened gate and crossed the street to meet their brother, Thomas, who was getting off the bus. After Thomas Campbell had left the bus and another child had boarded it, the driver shut the door of the bus, and, after looking around, slowly started the

vehicle. It appears that James Russell Campbell had stopped immediately in front of the right front wheel of the bus while his sister was walking away and returning to the Campbell home. As the bus started he was struck either by the front bumper thereof or by the right front wheel and knocked to the pavement. Either the impact of the bumper or the wheel running over his head inflicted severe head injuries from which he died immediately.

On January 15, 1950, Mrs. Mary P. Campbell submitted the following statement concerning the accident which resulted in the death of her minor son:

"On November 21, 1949, at 1610 [4:10 p. m.] I left the PX in the car (Mrs. Gainey, wife of Captain Gainey, told me the time) and drove directly home into the yard. I closed the driveway gate but one-half of the gate could not be closed, so that a child could open it. On occasions when I left the children in the yard to play I tied this gate with a belt. On this day I planned to be with the children in the yard to meet the older child when he got off of the bus. I saw the bus at the Clains corner and decided that I would have time to carry a package into my house before the bus got to our house. I came out of the door of my house in time to see my two small children go out the gate. I called and started running after them. The driver was watching the doorway where my older child had gotten off and another child was getting on. After the door was closed the driver looked toward me and my house. When my older child got out of the path of the bus the driver started off and I screamed 'No, no, stop,' before I saw my baby hit.

"I had gotten to the walkway gate and was just in line with where he was hit. He was following the other two children back to the house when he was struck down. He was running toward me and was at least 6 feet out in front of the bus. The bumper hit him as he was midway between the right front wheel and the center of the radiator. The wheel did not go over any part of his body. To get out of the yard I had to go out the driveway gate. I went across the street in front of the bus to get to the door side of the vehicle and got there before the driver got out. My baby was lying flat on his back with his head toward the front of the bus and his legs to the rear. His arms were outstretched and eyes closed as I knelt beside him. He was completely under the bus. I had to reach under the side of the bus to get him * * *.

"I believe the driver could have seen one of the two small children if he had looked in front of the bus before starting off. My little girl got out of the path of the bus after it started moving. I'm sure he never saw her either."

Alfred Schumann, the driver of the bus involved in this accident, in an affidavit executed by him on November 22, 1949, stated:

"On November 21, 1949, at about 1630 hours [4:30 p. m.] I drove the school bus No. 2040026 along Hasenrainweg in eastern direction. The bus was occupied by 7 children, 6 to 7 years old. With a speed of approximately 10 miles per hour I approached the stop 74 Hasenrainweg. There I stopped so that the front bumper of my bus was on the same level with the curb of the road to Hirschland Strasse. When I approached the stop neither children nor any grown-ups were in immediate vicinity of the road. While stopping the bus I took it out of gear and put on the hand brake. Then I opened the door and the child Tommy Campbell went from the rear of the bus to the door and left it. Another child with the surname Susie entered the bus. After that I heard Tommy, from outside, knocking at the bus. This he did almost every day. It was the sign for me that he is going away from the bus. Then I shut the door, disengaged the clutch, put in the second gear and disengaged the hand brake. Then I looked on the street in front of me and into the rear-view mirror, and made sure that the road was clear. Then I let the clutch in and applied the accelerator pedal slightly. At the same moment I heard a cry, and I stopped immediately. I took the bus out of gear, put on the hand brake, and opened the door and left the bus. I looked back to Tommy who had left the bus. He stood half a meter far from the vehicle on the sidewalk and cried. Tommy looked past me to the front of the vehicle. I wanted to ask him what happened and turned around. I saw a lady (Mrs. Campbell) who collapsed near the front wheel. Thereby I saw a child lying underneath the vehicle, 1 meter behind the front wheel. The child was dead. I immediately went to the lady trying to help her up, in order to get to the child. I did not succeed in doing so. Then another lady came along to help Mrs. Campbell. I ran into the nearest house to ring the phone for help. But I could not get connected. Returning to the bus I was told by some people that Mrs. Campbell took the child into the house. Later on the MP and the German police appeared and recorded the accident.

"I am a professional driver since 1921. I was never involved in any accident. Since 1945 I drive American busses. Since 1946 I drive school busses. Until this date I committed no traffic violation whatsoever, and I am in no way previously convicted.

"I would like to add that I have not seen the child and Mrs. Campbell before. By no means, I would have driven on if I had seen a child."

On November 22, 1949, Mrs. Paula Gehrig, 54 Hasenrainweg, Oberesslingen, Germany, made the following sworn statement:

"On November 21, 1949, about 1630 hours [4:30 p. m.] I walked on the road from Hirschladhof in direction Hasenrainweg. When I was approximately 15 to 20 meters away from it, I met two acquaintances of mine and stopped. During our conversation a school bus came downhill on Hasenrainweg and stopped at the corner. We looked over, as we know some of the children. I saw a boy leaving the bus and a little girl standing beside the door. I turned away for a moment and then looked back to the bus. This one was just starting and in front of its right front wheel, directly in front of it, a small child was standing, that did not even reach to the bumper. I cried out terribly, and at the same time heard a woman in a blue coat in the garden of the house No. 74 cry out. I saw then that the wheel drove over the child in whole length, and then, terrified, I turned my face away. When I looked back again, the woman in the blue coat was beside the bus and had collapsed over the child, and the bus driver held her under her arms. He tried to help her up. Thereafter I ran to the Children's Hospital and summoned a doctor, who immediately stated the death."

On the same date Miss Ruth Eisenhardt, 49 Hasenrainweg, Oberesslingen, made the following sworn statement:

"On November 21, 1949, about 1630 hours [4:30 p. m.] I walked with Mrs. Maisch on the road to Hirschlandhof. Approximately 20 meters away from the corner Hasenrainweg we met an acquaintance, Mrs. Gehrig. While we were talking, we saw a school bus proceeding on Hasenrainweg. It stopped on the corner. I saw a boy getting out of the bus and looked away. I had not seen any other children, but one other child at the door of the bus. As I looked back automatically, I saw the bus starting. In front of its right front wheel a small child was standing, that stood so close to the wheel that I had the impression it was holding on to it. I saw the child fall backward and looked away. In this moment Mrs. Gehrig cried out. I looked again and saw the wheel rolling over the head of the child. Hereby something squirted out. Terrified I ran a few steps away. As I looked back again, I saw a lady in a light coat at the bus and a man held her under the arms. Then we ran to the hospital and got a doctor. I do not know when and how the small child approached the vehicle. I had not seen it before the bus started."

On the same date Mrs. Hedwig Maisch, 49 Hasenrainweg, Oberesslingen, made a sworn statement substantially similar to the statements of Mrs. Gehrig and Miss Eisenhardt.

First Lt. Everett C. Sutton, Judge Advocate General's Corps, who investigated this accident, submitted a report in which he made the following findings and recommendations:

"*Findings.*—A. Accident, details of: The bus driver stopped at a corner to discharge a child, the child got off, another got on the bus. The driver states the discharged child knocked on the door of the bus as he had done before to signify he was clear. The driver started the bus, heard a scream, and stopped the bus. (The bus traveled approximately 2 to 3 meters.) As the bus started a 20-month-old child was seen standing in front of the right front wheel. The wheel ran over the child killing it. The driver could not have seen the child standing in front of the wheel. He did not see it before the accident.

"B. Visibility: Clear.

"C. Traffic conditions and right-of-way: Only vehicle.

"D. Mechanical condition: Good.

"E. Responsibility: Whoever was caring for the child at time of accident.

* * * * *

"*Recommendations.*—1. That the responsible officer and driver concerned be relieved of liability and responsibility.

"2. That the driver's license be returned to Schumann.

"3. No claim be allowed.

"4. No disciplinary action."

The above-quoted findings and recommendations were approved by the provost marshal, Stuttgart Military Post, United States Army, Stuttgart, Germany.

Major Campbell has submitted to the Department of the Army a certificate signed by him in which he states that he incurred the following expenses in connection with the burial of his minor son in the United States:

Preparation of remains, casket, and sealing of casket.....	\$63. 00
Holland Funeral Home, Lancaster, S. C.....	104. 36
Flowers for funeral.....	40. 00
Gravestone.....	122. 00
Urn for grave.....	100. 00
Total.....	429. 36

Major Campbell has also certified that he incurred the following expenses in connection with the travel of his family during their trip to the United States for the burial of his son:

Washington, D. C., to Lancaster, S. C., via rail.....	\$35
Lancaster, S. C., to Tampa, Fla., via automobile.....	96
Tampa, Fla., to Heflin, Ala., via automobile.....	66
Heflin, Ala., to Lancaster, S. C., via rail.....	40
Lancaster, S. C., to Washington, D. C., via rail.....	35
Total.....	272

Major Campbell has further certified that he incurred the following expenses on account of the purchase of appropriate clothing for his wife to attend the funeral:

Black dress for funeral.....	\$25
Shoes.....	12
Hat.....	15
Total.....	52

It, therefore, appears that Major Campbell has incurred expenses as the result of the death of his son in the aggregate amount of \$753.36.

The evidence in this case fairly establishes that the driver of the Army bus involved in the accident of November 21, 1949, was operating said bus in a careful and prudent manner; that he did not see James Russell Campbell or his sister walk in front of the bus; that, since he was undoubtedly watching Thomas Campbell dismount from the bus at the right side thereof, it is not surprising that he failed to observe the approach of the little Campbell girl and her younger brother on his left from the other side of the street; and that James Russell Campbell was standing in such close proximity to the right front portion of the bus that the driver was unable to see him when he started the bus.

While it is a general rule of law that a motorist, in approaching children on the street, must consider their tenderness of age and the probability of their making sudden and erratic movements peculiar to such age as factors calling for greater caution than would be necessary on the discovery of adults in the same situation, the evidence in this case shows that there were no children in the street at the time the driver of the Army bus stopped his vehicle. Inasmuch as the driver did not see James Russell Campbell or his 4-year-old sister walk in front of his bus, he had no reason to anticipate that a child might be near the vehicle and in a dangerous position.

In *Blashfield's Cyclopedia of Automobile Law and Practice*, Permanent Edition (volume 2, sec. 1509), it is stated that:

"If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his car negligence cannot be predicated on the mere fact that he started his machine, injuring the child.

* * * * *

"Ordinarily a driver is not required to search for children on the running board on the far side of the vehicle, or hidden underneath or in front of it, whom he cannot see before starting."

In the case of *Williams v. Cohn* (201 Iowa 1121, 206 N. W. 823), the facts were similar to those in the present case. There the driver of a delivery truck lawfully stopped his vehicle to deliver groceries. While the groceries were being delivered an 18-month-old child of the party who had ordered the groceries walked in front of the truck and stood next to the right front wheel. The deliveryman did not see

the child walk in front of his truck, and the child was standing in such a position that he was unable to see it when he started to leave. The truck struck the child and it was killed. The Supreme Court of Iowa in reversing a judgment of \$1,500 for damages on account of the death of the child said:

"A driver of a truck is under no legal obligation to make a search around and under his car 'lest a child too young for discretion and undirected by parents has tucked herself away in an obscure place beyond the casual and convenient notice of the driver'."

In *O'Reilly v. Sherman* (298 Mass. 571, 11 N. E. (2d) 446), the driver of an automobile parked his car at the side of a street. He left the vehicle and returned in about 20 or 30 minutes. While he was away from the automobile a small child, 2 years and 3 months of age, walked in front of the vehicle. When the driver returned to his car he entered it through the left front door. The child was standing in such close proximity to the front of the automobile that the driver was unable to see it when he entered the vehicle. Upon starting the automobile the driver heard a cry, whereupon he stopped immediately, got out of the car and found that the child had been run over by the right front wheel. In reversing a judgment in favor of the plaintiff the Supreme Judicial Court of Massachusetts said:

"The case is not like those in which a defendant had reason to expect to find a small child about his automobile when he started it. * * * Here the defendant had been away from the automobile a considerable time. When he returned no child was in sight, so far as appears. He owed only the duty of ordinary care. For all that appears, he did all that ordinary prudence would dictate before starting the automobile. There is no evidence that the presence of the plaintiff could have been discovered without close inspection of the front of the automobile, and perhaps of other places. Ordinary care did not require that."

In *O'Neil v. Cochrane* (184 Minn. 354, 238 N. W. 632), the driver of a delivery truck parked his vehicle in a public alley to deliver groceries. It appears that while the groceries were being delivered a 2-year-old child walked in front of the parked truck. In returning to his truck the driver passed along the left-hand side of the vehicle and entered the cab from that side. The driver did not see the child walk in front of the truck, and the child was standing so close to the front of the vehicle that the driver was unable to see it after he entered the cab. As he started to drive away the driver heard a cry, whereupon he stopped the truck within 3 feet. Upon investigation he found that the child had been run over and injured by one of the wheels of the truck. In affirming a judgment in favor of the defendant the Supreme Court of Minnesota said:

"* * * Having seen no one around the truck or in the alley as he returned from the plaintiff's house, we do not think that ordinary prudence required him to investigate the right side of his vehicle farther than he did from the seat at the wheel."

In this connection it should be noted that the Army bus involved in the accident of November 21, 1949, in which James Russell Campbell was killed, was of the type which has the motor in front of the driver's cab, so that the driver would be unable, while sitting in the driver's seat, to see a small child standing in front of the right front wheel.

After a careful consideration of all of the evidence in this case the Department of the Army cannot escape the conclusion that the driver of the Army bus involved in the accident of November 21, 1949, was guilty of no negligence which proximately caused or contributed to said accident and the resulting death of James Russell Campbell.

The Federal Tort Claims Act, approved August 2, 1946 (60 Stat. 843; 28 U. S. C. 931), as revised and codified by the act of June 25, 1948 (62 Stat. 933; 28 U. S. C. 1346 (b)), and as amended by the act of April 25, 1949 (Public Law 55, 81st Cong.), provides that the United States district courts—

"* * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *"

The Federal Tort Claims Act, as amended (62 Stat. 984; 28 U. S. C. 2680 (k)), provides that said act "shall not apply to * * * any claim arising in a foreign country." Major Campbell, therefore, has no remedy under the Federal Tort Claims Act, as amended, for the reason that the accident which resulted in the death of his minor son occurred in a foreign country. There is no other

statute under which he may recover damages on account of said death. It seems clear, however, that even if he were permitted to sue the United States under the Federal Tort Claims Act, as amended, he could not recover for the reason that the evidence fails to show that the death of his son was caused by any negligent or wrongful act or omission on the part of the driver of the Army bus.

In the light of the evidence in this case and the authorities herein cited the Department of the Army is of the view that there is no basis for the granting of an award to Major Campbell on account of the death of his son. The Department, therefore, while deeply regretting this tragic occurrence, is obliged to recommend that this bill be not favorably considered by the Congress.

The Bureau of the Budget advises that there is no objection to the submission of this report.

Sincerely yours,

FRANK PACE, Jr.,
Secretary of the Army.

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